SUPREME COURT. U.S.

IN THE

Supreme Court of the United States

SEP 27 1961
JAMES R. BROWNING, Clerk

October Term, 1961

Nos. 452

CHARLES GOLDSTEIN, *Petitioner*

v.

MEGERDICH DABANIAN and EMMA K. DABANIAN
t/a EAST TIOGA CHECK SERVICE, *Respondents*

LOUIS SERNOVITZ and SIDNEY SINGER, *Petitioners*

v.

IRVING HERTZ t/a TERMINAL CHECK SERVICE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on June 2, 1961 (petition for rehearing denied, June 29, 1961).

JURISDICTION

The judgment of the Court of Appeals was dated and entered June 2, 1961 (App. A, p. 14), and the petition for

a rehearing was denied on June 29, 1961 (App. C, p. 16). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the business of cashing checks, issuing money orders and accepting payment of utility bills constitutes "sales of goods or services" by a "retail or service establishment" within the meaning of the exemption provided in Section 13(a)(2) of the Fair Labor Standards Act.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. Appellants' App. 11a-18a) are not officially reported but do appear at 41 LC ¶31,048. The opinion of the Court of Appeals (App. A, infra, pp. 9-14) is unreported also; however, it unofficially appears at 42 LC ¶31,113.

STATUTES INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U. S. C. 201 et seq.), are set forth in Appendix B, infra, pp. 15-16). The provision particularly involved here is Section 13(a)(2) which reads as follows:

> The provisions of sections 6 and 7 shall not apply with respect to . . . any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or service is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; . . .

STATEMENT

Petitioners were employed by Respondents for work weeks in excess of 40 hours but were not paid at the rate of one and one-half times the hourly rate for such time in excess of said 40 hours (R. Appellants' App. p. 13a).

This action was brought by the Petitioners to seek payment of wages at the rate of time and a half for hours worked by them in excess of forty hours a week as is required by §7(a) of the Fair Labor Standards Act, as amended, 29 U. S. C. A. §207(a), for employees covered by the Act.[1]

The Respondents brought a motion to dismiss the actions on the grounds that the Petitioners were not engaged in interstate commerce and that even if Petitioners were so engaged, that, they, the Respondents, were exempt from the mandates of §7(a) of the Act because Petitioners were employed in an administrative capacity or were employed by a retail or service establishment within the dictates of §13(a) (1 and 2) of the Act, 29 U. S. C. A. §213(a) (1 and 2), and Regulations of the Department of Labor promulgated persuant thereto (R. Appellants App. p. 11a).

The lower court sustained the Respondent's motion to dismiss by stating,

"For the period of times material here, each of the plaintiffs were not engaged in interstate commerce or in the production of goods for such commerce within the meaning of §§6(a) and 3 of the Act, 29 U. S. C. A. §§206(a), 203." (R. Appellants' App. 17a). The District Court further stated, "Whether plaintiffs were exempt from the provisions of the Act by reason of §13 thereof is unnecessary for decision in these actions." (R. Appellants' App. p. 13a).

The Court of Appeals (Appendix A, pp. 9-14) found that contrary to the district court's determination, the

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[1] Although two separate actions were filed they were considered together in both the District and the Court of Appeals because the circumstances in each are almost the same.

petitioners fell within the general coverage of the act but that the retail exemption provision of the Act was applicable because the "check cashing service more nearly approximates a hotel or barber shop than it does a bank or personal loan company," and therefore the court was in agreement with the result reached by the district court but for a different reason (Appendix B. f. n. 6, p. 14).

The Petitioners then filed a petition for rehearing (R. Appellants' App. pp.) which was denied by the Court on June 29, 1961 (Appendix C).

REASONS FOR GRANTING THE WRIT

The decision below is in conflict with this Court's decision in *Mitchell v. Kentucky Finance Company*, 359 U. S. 290 (1959). In that case this Court resolved the foregoing conflict between the various Circuit Courts as to the application of the "retail" exemption provided by the Fair Labor Standard Act as amended in 1949 particularly as it applied to banks, personal loan and credit companies and other financial institutions. The decision of the Third Circuit undermines this Court's decision and could reopen many of the questions resolved by this Court and if permitted to stand will create a form of exemption not contemplated by Congress as evidenced in the legislative history of the 1949 amendments. Again, here as in the *Kentucky Finance Company* case the issue presented would be of great importance even if it were limited to the many workers employed across the country in the vast and extensive check cashing business, but it is vastly magnified by the implications of the opinion which would enable many other industries heretofore unquestionably ineligible for the Section 13(a)(2) exemption to lay claim to it substantially and adversely affecting the proper future administration and enforcement of the Act.

1. That respondents' business does not qualify for exemption as a "retail or service establishment" has been settled, we submit, by this Court's decision in *Mitchell v.*

Kentucky Finance Co., 359 U.S. 290 (1959). To permit the decision to stand is to create an exemption not contemplated by law and open the door for previous ineligibles to claim an exemption thus creating great confusion and disruption in the future administration and enforcement of the Act.

This Court in *Kentucky Finance* dealt with the question of whether a small loan company, which met the "industry recognition" and other percentage tests provided by Congress in its 1949 amendments to §13(a)(2), could thereby qualify for this exemption.

In holding that the business before it was not "otherwise eligible under existing concepts" the Court concluded that "*enterprises in the financial field, none of which had previously been considered to qualify for the exemption* regardless of the class of persons with which they dealt, and regardless of whether they were thought of in the financial industry as engaged in 'retail financing', *remained unaffected by the amendment of §13(a)(2)*" (359 U.S. at 294-5, emphasis added). This Court added that "(a)ny residual doubt on this score" is dispelled by explicit statements in the legislative history to the effect that " 'The amendment does not exempt banks, insurance companies, building and loan associations, credit companies, . . . telephone companies, gas and electric utility companies, . . . etc., because there is no concept of retail selling or servicing in these industries. Where it was intended that such businesses have an exemption one was specifically provided by the law . . .' " (359 U.S. at 295).

The fee or rate charged by respondents varies according to the face amount of the check (R. Appellees' Appendix, p. 7b) and this is the equivalent of, or similar to, the discounting of commercial paper, particularly since the customer remains liable for the full amount of the check, as an endorser, if unpaid by the drawer or the drawer's bank, and the discounting of notes constitutes a phase of banking under the Pennsylvania Banking Code of May 15, 1933, P. L. 624, as amended, 7 Purdon Statutes 819-2. See *Professional*

Credit Service Ass'n v. O'Hara, 40 D. & C. 291, 295. In *National Bank v. Johnson*, 104 U.S. 271, 276, it is stated that "the terms 'loans' and 'discounts' are synonyms."

It seems clear therefore that check cashing or discounting is more closely related to banking, small loan companies or finance companies than to room renting by hotels or haircutting by barbers. The U. S. Budget Bureau was not frivolous in classifying check cashing agencies under the major category of Banking in the Standard Industrial Classification Manual, U. S. Budget Bureau, 1957, p. 176.

It thus follows from this Court's and Congressional recognition of the inapplicability of any "retail" exemption in the financial industry that respondent's enterprise, like the personal loan company in *Kentucky Finance*, is not "eligible under existing concepts to achieve exemption."

2. Even if the check cashing business is correctly considered to be within the retail concept, the cases should be remanded for trial and proof by respondents that their establishments meet the three percentage tests which are prerequisites for the Act's "retail" exemption. To permit the bypassing of proof of these statutory requisites to the "retail" exemption is to seriously hamper the orderly administration and enforcement of the Act and is contrary to this Court's previous decisions in this area.

In particular, there is serious doubt that respondents could establish that 75% of their sales are "not for resale" within the statutory condition, since the checks and money orders in which respondents deal are not "consumed" by respondent's customers but are the subject of further transfer and negotiation. In this connection, see *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (sales of aircraft parts for incorporation in aircraft which are then sold held "for resale"); *Mitchell v. Sherry Corine Corp.*, 264 F. 2d 831 (C.A. 4), certiorari denied, 360 U.S. 934 (sales of food to airlines for service to their passengers on interstate flights held "for resale"); *Sucrs. de A. Mayol, Inc. v. Mitchell*, 280 F. 2d 477 (C.A. 1), certiorari denied, 364 U.S. 902

(sale of building materials for incorporation into the property of the contractor's customers held "for resale"); and *Mitchell v. Duplicate Photo Service* (S.D. Calif. 1956), 13WH Cases 71, 31 Labor Cases ¶70,287 (not officially reported) (sale of movie star and other photographs to advertising and publicity agencies for further distrbution to movie fans, newspapers and others held "for resale"). Under these decisions it would appear that respondents, who deal in items which, as in the above cases, are the subject of further commercial distribution beyond respondents' own customers, cannot sustain the burden of meeting this necessary condition for exemption, and therefore would not be entitled to the exemption even if the conjunctive requirement of recognition in the industry were adequately proved.

When the respondents received checks for collection it was with the contemplation that these checks would be taken to their own bank for collection and the bank would charge them a fee for the handling and collection thereof and this falls clearly within the definition of "resale" as appearing in 29 C.F.R. 779.15(b).

It is to be seriously doubted that four self-serving ex parte affidavits is sufficient evidence to establish the other requisite to the exemption that 75% of respondents' sales are "recognized as retail sales or services in (not by) the particular industry." See *Walling v. Reid*, 139 F. 2d 323 (C.C.A. Neb. 1943), 29 C.F.R. §779.8(d). It is significant to note that the District Court never made a judicial determination as to the "retail exemption" but stated "Whether plaintiffs were exempt from the provisions of the Act by reason of §13 thereof is unnecessary for decision in these actions." (R. Appellants' App., p. 17a).

In any event, in order for a retail exemption under this section to apply, an employer must be recognized in the particular industry as a retail establishment, and such recognition is a question of fact for a jury, *Mitchell v. Birkett*, 183 F.S. 291 (D.C. Ark. 1960), *Mitchell v. City Ice Co.*, 273 F. 2d 560 (C.A. Fla.1960), and any employer who

asserts his establishment is exempt as a retail establishment, must assume the burden of proving that at least 75% of his sales are recognized in his industry as retail, *Arnold v. Ben Kanowsky, Inc.*, supra, *Mitchell v. Sorvas*, 182 F. S. 800 (D.C.Pa. 1960), and this proof is not restricted to a subjective test of what members of the industry think but what is recognized in the industry as retail sales must be proved objectively, *Mitchell v. City Ice Co.*, supra, and it must be remembered that the industry recognition test was intended to be applied only where the establishment was performing services susceptible of classification as "retail services", *Tobin v. Household Finance Corp.*, 106 F.S. 541, reversed on other grounds 208 F. 2d 67 (D.C.Pa. 1952), *Mitchell v. Kentucky Finance Co.*, supra, and the employer must prove 75% of his sales are "not for resale" within the statutory condition, *Arnold v. Ben Kanowsky*, supra, and any exception from humanitarian and remedial legislation of this chapter must be narrowly construed, and judicial construction should not broaden exception to cover businesses which Congress did not intend to include, *Mitchell v. Gammill*, 245 F. 2d 207 (C.A.La. 1957); *Mitchell v. Kentucky Finance Co.*, supra; *Arnold v. Ben Kanowsky*, supra; *Mitchell v. Sorvas*, supra.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

By GOODRICH, *Circuit Judge.*

These two appeals present the same question, namely, whether employees of the two defendants are engaged in interstate commerce or the production of goods for commerce under the Fair Labor Standards Act, 29 U. S. C. A. §206(a). The plaintiffs sued to recover unpaid overtime compensation, liquidated damages and counsel fees.[1] The district court held that they were not engaged in commerce or the production of goods for commerce and dismissed the action. The decision is unreported.

It is agreed by all persons concerned that the question here is not determined by the nature of the business in which the employer is engaged but by the duties of the individual employees. *Mitchell v. H. B. Zachry Co.*, 362 U. S. 310 (1960); *Mitchell v. Household Finance Corporation*, 208 F. 2d 667 (3d Cir. 1953). These employees did three things for their respective employers. One, for a fee they cashed nonpersonal checks presented to them. These checks, usually but not always, are payroll checks,[2] Two, they issued money orders drawn on American Express or National Express. Three, they accepted payment, for a small fee, of utility company bills. Most of the customers were persons who did not have individual bank accounts of their own. The trial court decided that these plaintiffs were not engaged in commerce or the production of goods for commerce. He found it unnecessary to determine

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[1] The Secretary of Labor submitted a brief to this Court as amicus curiae.

[2] Some personal checks in amounts up to twenty dollars were also cashed for persons known by the particular employees.

whether they qualified under exceptions to the rule for coverage described in the statute.

Contrary to the district court's determination we think that these employees fell within the general coverage of the act. What they did was to cash these checks and at the end of a business day total them up for deposit in the employer's bank account. While 91% of the checks were drawn on local banks in Pennsylvania, 9% of them were drawn on banks out of the state.

That the checks are "goods" within the meaning of the statute was decided by the Second Circuit in *Bozant v. Bank of New York*, 156 F. 2d 787 (2nd Cir. 1946), applying *Western Union Telegraph Co. v. Lenroot*, 323 U. S. 490 (1945). The *Bozant case* was discussed and approved in our decision, *Mitchell v. Household Finance Corporation*, supra.

Nine percent of the checks had an out-of-state destination for presentment and payment. This, of course, constitutes interstate commerce on the part of the employer. See *Mabee v. White Plains Publishing Co.*, 327 U. S. 178 (1946).

The handling of the checks by these employees was also a part of interstate commerce. In cashing the checks and making the deposits in the appropriate bank, these employees were forwarding goods in interstate commerce just as truly as an initiating intrastate carrier is part of the process of interstate commerce when it delivers the goods consigned to an out-of-state destination to the carrier who takes them to the place of delivery. What the employees did, in other words, was to start these checks on the first lap of an interstate journey by depositing them in a local bank. That being so, the employees are covered by the act unless excluded by the exemptions.

The next question, therefore, is whether the plaintiffs are exempt by reason either of being administrative employees or employees of a retail establishment. 29 U. S. C. A. §§213(a)(1), (2). Let us turn first to the administrative question and see what these employees did. The district

court in its consideration of the case was not called upon to decide this question because it considered that the plaintiffs' work was not part of interstate commerce. There is no fact question presented, however. There is no dispute as to what took place. The difference of opinion concerns the effect of the acts done. Administrative employees are defined in regulations of the Secretary.[3] These employees had no one to direct in the operation of their part of the business. They were the sole employees in the several offices

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[3] "The term 'employee employed in a bona fide . . . administrative . . . capacity' in section 13(a)(1) of the act shall mean any employee:

(a) Whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general business operations of his employer or his employer's customers; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) (1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in this subpart); or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for his services on a salary or fee basis at a rate of not less than $75 [now $95] per week . . . exclusive of board, lodging, or other facilities:

Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than $100 [now $125] per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general business operations of his employer or his employer's customers, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all of the requirements of this section." 29 C.F.R. §541.200.

maintained by the employers.[4] Their primary duty was certainly not manual labor and they were paid $75.00 or more per week. They determined the identity of a person who wished to cash a check. For this purpose there were office files of signatures for many of the habitual customers. If a person was not listed in the file he was required to identify himself by some other means. At the end of the day the cashed checks were made up into a list and deposited at the appropriate bank. The employees alone determined the amount of currency needed for the day's business.

It would not be disputed that a certain amount of discretion was involved in making an estimate of the cash needs for the day and also determining the identity of the customers who wished to have their checks cashed. But such activity does not place the employees in the administrative group. Indeed, the discretion to be exercised is less than that of a top mechanic employed in an automobile service station whose judgment about diagnosing the ailment of a motor car and prescribing for its cure calls for a high degree of technical competence. The scope of the discretion here is much too narrow to place the employees in the administrative class.[5]

We turn, then, to the final question whether these plaintiffs were engaged in a retail establishment. The Government says that this question is determined by the Supreme Court decision in *Mitchell v. Kentucky Finance Co., Inc.*, 359 U. S. 290 (1959). In this case it was held that the business of making small personal loans and purchasing conditional sales contracts from dealers did not constitute an exemption from the coverage of the statute following the amendment of 1949. The Supreme Court also

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[4] On occasional busy days part-time employees were hired to assist them.

[5] The district court found that supervision of these employees "was unnecessary because [their] duties were routine and followed a set pattern." See Rothman v. Publicker Industries, Inc., 201 F. 2d 618 (3rd Cir. 1953).

pointed out that exemptions from this statute are to be narrowly construed.

In the present case more than 50% of the business handled by these plaintiffs was local business. They served customers in the community. They sold no goods but they did provide a service as a convenience to their customers for which the latter paid. There are affidavits that the trade considered this to be a retail enterprise.

This case is not determined by the Supreme Court decision in *Mitchell v. Kentucky Finance Co.* just cited. These employees are not bankers nor dealers in finance. They do not make loans; they do not extend credit. Their functions have none of the features which go along with orderly banking or financial institution enterprises except for the cashing of checks. But that cashing for their customers is a purely local, personal service for the neighborhood people who patronize them. They perform a retail service.[6] They do not fall within those statements which

[6] In this case the concept "retail" seems rather artificial since but for this statute we would find difficulty in conceiving how any question would arise whether this type of activity is "retail," "wholesale" or whatever. The Secretary's regulations provide:

> "It will be observed that the sponsors of the amendment, in classifying industries on the basis of the applicability of the retail concept to their selling or servicing, did so on the basis of common knowledge as to what is recognized and what is not recognized as retail selling or servicing in the light of the objectives and purposes of the exemption as to the type of establishment it is intended to exempt. Thus, the dividing line between sales and services to which the retail concept is applicable and those to which it is not applicable is the general and common understanding of people of what constitutes a retail sale or service in the traditional sense. . . ." 29 C.F.R. §779.9(c).

We doubt very much whether this type of activity is or is not considered "retail" in the common understanding of the public. However, the regulations go on to describe the "characteristics" of a retail establishment.

> "Typically a retail or service establishment is one which sells goods or services to the general public. It serves the everyday needs of the community in which it is located. The retail

exclude financial agency transactions from the exemptions of the statute.[7] The issuance of money orders and payment of utility bills are clearly within the retail service concept.

This conclusion brings us into agreement with the result reached by the district judge but for a different reason.

The judgment of the district court will be affirmed.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF
Clerk

June 2, 1961

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or service establishment performs a function in the business organization of the nation which is at the very end of the stream of distribution, disposing in small quantities of the products and skills of such organization and does not take part in the manufacturing processes." 29 C.F.R. §779.9(d).

In attempting to analogize to activities which clearly fall within and without the exemption, we think this check cashing service more nearly approximates a hotel or barber shop than it does a bank or personal loan company. See 29 C.F.R. §§779.10(a), (b). It "serves the everyday needs of the community in which it is located."

[7] See the administrative regulation describing the impact of the legislative history. 29 C.F.R. §779.9(b).

APPENDIX "B"

The Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U. S. C. 201), provides in pertinent part:

SEC. 7. [63 Stat. 912-913]:

(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

SEC. 13 [63 Stat. 917]:

(a) The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; or (3) any employee employed by any establishment engaged in laundering, cleaning or repairing clothing or fabrics, more than 50 per centum of which establishment's annual dollar volume of sales of such services is made within the State in which the establishment is located: *Provided*, That 75 per centum of such establishment's annual dollar volume of sales of such services is made to customers who are not engaged in a mining, manufacturing, transportation, or communications business; or (4) any employee employed by an establishment

which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided*, That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; . . .

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SUR PETITION FOR REHEARING

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court

GOODRICH
Circuit Judge

Dated: June 29, 1961